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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules	)	CS Docket No. 95-178
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To: The Commission

REPLY
COMMENTS OF
THE HEARST CORPORATION

The Hearst Corporation ("Hearst") is, among other things, the licensee of six television broadcast stations: WCVB-TV, Boston, WBAL-TV, Baltimore, WTAE-TV, Pittsburgh, WDTN-TV, Dayton, WISN-TV, Milwaukee, and KMBC-TV, Kansas City. Hearst has recently filed an application requesting Commission consent to acquire an additional television station, WTMV-TV, in Lakeland, Florida.

By Notice of Proposed Rulemaking FCC 95-489 (Released: December 8, 1995) the Commission indicated its intent to revise Section 73.3555(e)(3)(i) of the rules which Section 614(h)(1)(C) of the Communications Act of 1934 formerly incorporated by a reference to govern a commercial television station's right to assert mandatory carriage on cable television systems located within the station's market. The need for a change in the rule stems from the fact that the Arbitron Ratings Company ("Arbitron") no longer produces television ratings. The existing rule defines television markets in terms of Arbitron's "Areas of Dominate Influence" ("ADIs"). However, A.C. Nielsen Company ("Nielsen") is currently the only provider of television ratings data. Nielsen employs a different system to define television

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markets and terms its markets: "Designated Market Areas" ("DMAs"). The Commission has tentatively concluded that Section 73.3555(e)(3)(i) of the Rules should be amended "to establish a new mechanism for defining market areas in which television broadcasters may insist on carriage." Notice, Paragraph 6.

The Commission indicated that it believes there are three options worthy of consideration: (1) substitute Nielsen DMA's for Arbitron ADI's; (2) continue using Arbitron's 1991-1992 *Television ADI Market Guide* to define local television markets, subject to individual review and refinement through the Section 614(h) process; and (3) retain the existing market definitions for the 1996 election period and switch to a Nielsen based standard thereafter. Notice, Paragraph 6.

The Commission expressed its "tentative view" that option two is preferable. Hearst disagrees. Hearst believes that option one is clearly preferable. Options two and three would both require the Commission to reopen, without any factual justification, an issue that was settled in 1993: that current market definitions would be used for every three year must carry/retransmission consent election. Predictably, most of the comments were split along industry lines with broadcasters favoring option one and cable operators favoring option two.[1] On February 8, 1996, following the filing of initial comments in this proceeding, President Clinton signed into law "The Telecommunications Act of 1996."[2] Among other things, the

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[1]Compare, e.g. Comments of National Association of Broadcasters, and Comments of Association of Local Television Stations with Comments of National Cable Television Association and Comments of Small Cable Business Association.

[2]1. See, Cong.Rec-House, H1079-H1137 (January 31, 1996) (containing text of the statute and the Conference Committee Report); Cong. Rec.-Senate, S720

Act speaks in a dispositive fashion to the question posed in this docket. From a practical standpoint, it plainly militates in favor of simply switching market definition standards from the ADI to the DMA.[3]

Hearst agrees that the Rule must be amended and offers the following reply comments.

ARGUMENT

The Commission Should Use Nielsen DMA's To Define Local Television Markets and Such Change Should Be Made Effective Immediately

The Commission should adopt an amendment to the must carry market definition rule to substitute Nielsen DMA's for the now non-existent Arbitron ADI's. This change should be made effective immediately. Existing 614(h) market modifications should be grandfathered. The "home county" exception should be continued. Adopting such an approach will be consistent with law and sound public policy while at the same time conserving the Commission's scare resources.

The logic supporting this regulatory approach is straightforward and clearly flows from the comments filed in this proceeding. First, the current rule contemplates that current market data will be employed during each three year must carry/retransmission consent election cycle. C.F.R. Section 76.55(e)(1975). The note to Section 76.55(e) is explicit on this point and

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(February 1, 1996) (containing Senate vote); Cong. Rec.-House, H1179 (February 1, 1996) (containing House vote).

[3]Telecommunications Act of 1996, Section 301(d)(1)(A), amending Section 614(h)(1)(C) of the Communications Act of 1934.

states:

> "For the 1993 must-carry/retransmission consent election, the ADI assignments specified in the 1991-1992 *Television ADI Market Guide*, available from the Arbitron Ratings Co., 312 Marshall Ave., Laurel, MD, will apply. ADI assignments will be updated at three-year intervals. For the 1996 election period, the 1994-1995 ADI list will be used; the applicable list for the 1999 election will be the 1997-1998 list, etc." [emphasis added]

The Commission made the decision to employ current market data for each new must carry/retransmission consent election cycle in 1993.[4] Accordingly, any change in the rule must be supported by changes in underlying facts and a reasoned analysis of why such factual changes should yield a different policy.[5]

Here, no such factual changes have occurred. Arbitron's departure from the television ratings business, while certainly a change in the ratings market place, is not a factual change that would justify a change in the core decision to use current market data for every three year election period. Generally, the comments supporting the approach of freezing the 1991 Arbitron ADI market definitions indefinitely were made by cable operators who desire to reopen an issue settled in 1993 (using the same arguments rejected in 1993) or were made by a broadcast station attempting to "freeze" into place a perceived regulatory advantage.[6]

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[4]Report and Order in MM Docket No. 92-259, 8 FCC Rcd 2965, 2974, 72 RR 2d 204, 220 (1993).

[5]See, e.g. United Video v. FCC, 890 F.2d 1173, 1182 (D.C. Cir. 1989) (reversal in policy must be justified by a thorough review of the record and changes in facts which support such a reversal in policy); Action for Children's Television v. FCC, 821 F.2d 741, 745 (D.C. Cir. 1987) (when reversing policy directions, the Commission must "supply a reasoned analysis indicating that its prior policy and standards are being deliberately changed and not casually ignored.")

[6]Report and Order, 72 RR 2d at 220.

A second compelling reason to use Nielsen DMAs as the market standard is that to do so would be consistent with the intent of Congress in passing both the 1992 Cable Act and the Telecommunication's Act of 1996. Congress made clear in 1992 that the FCC should use a television market definition currently employed in the industry as the measure of a television station's market for must carry purposes. As noted, earlier this month Congress amended Section 614(h)(1)(C) of the Communications Act to make clear that the FCC should define television markets by "using, where available, commercial publications which delineate television markets based on viewing patterns."[7] Thus, Congress has implicitly expressed its intention for the Commission to employ current market data in defining television markets. Congress did not say that the Commission should use outdated market definitions when current data exists.

At present, Nielsen is the only provider of such market definitions since Arbitron has exited the business. Nielsen is the industry standard. No market definition system is perfect or static; some counties will, from time to time, move from one DMA to another. But this is, for the most part, the result of changes in viewing patterns in local markets. Over time, this is an issue that will solve itself. It is also inherent in Congress' decision to use market definitions based on "viewing patterns." The Commission should not, in the name of administrative convenience or "stability," casually disregard Congress' desire that markets be defined based on actual viewing patterns.

Use of current Nielsen DMAs every three years need not create a burden for the

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[7]Telecommunications Act of 1996, Section 301(d)(1)(A) amending Section 614(h)(1)(C) of The Communications Act of 1934 codified at 47 U.S.C. Section 534(h)(1)(C).

Commission or for cable operators. The Commission, by using current data for each three year election and by grandfathering the individual must carry market modifications made pursuant to the Section 614(h) process, would not likely receive any greater number of new Section 614 requests for individual market modifications to process. Cable operators may, of course, have to reanalyze the issue of which television broadcast stations to carry each three years. But this is inherent in the process of having a new must carry/retransmission consent election every three years. If the Commission were to freeze television market definitions at the year 1991, then it certainly would be reasonable to expect an influx of Section 614(h) petitions from broadcasters seeking to update their must carry markets to reflect actual viewing patterns. Such a process would be costly to affected television stations and a waste of the agency's scarce resources. The Commission should resist the temptation to "freeze" the definition of local television markets in the year 1991. Such a decision would be arbitrary, unsound and contrary to the intent of Congress. The system will work fine if the Commission will only give it the opportunity to work. As far as the Commission's work load goes, there is no evidence of record that would provide reason to believe that using current DMA market definitions would result in more Section 614(h) market modification petitions than would using the 1991 ADI data.

An additional reason for the Commission to employ Nielsen's DMA as its new standard is that to do so would be consistent with the existing rule's use of Nielsen DMA's for Alaska and Hawaii since Arbitron did not publish market definitions for those states.[8]

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[8] Report and Order 8 FCC Rcd at 2975.

The agency should also note that its past experience with "freezing" an outdated market viewing standard into its rules led to anachronistic results and, ultimately, a decision by the United States Court of Appeals for the District of Columbia Circuit which was an embarrassment for the agency and an example of inflexible and irrational policy-making.[9] Constructing a rule designed to become a regulatory anachronism does not promote respect for the law or the agency. The Commission should not embark down the same path in 1996.

Finally, the Copyright Office has made clear that, for purposes of cable's compulsory license to carry television signals, it will use the FCC's local market definition. See Comments of Copyright Office, p. 3. See also, Copyright Office Policy Decision, 60 Fed. Reg. 65072, 65073-74 (December 18, 1995). The fact is, of course, that the larger television stations' markets are, the smaller will be the amount of royalties owed by cable systems under the compulsory license. Comments of Copyright Office, p.2. Congress' passage of the Satellite Home Viewer Act has expanded the "royalty free" area for cable carriage of television stations from the old 1972 must carry area to the ADI. This has been particularly helpful in eliminating an old and confusing regulatory anachronism. The Commission can further clarify the copyright implications of cable carriage of television signals in this proceeding by making the switch from the now defunct ADI to the DMA.

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[9]See, KCST, Inc., 49 RR 2d 1118 (Cable Bureau 1981), rev'd and remanded. KCST, Inc. v. FCC, 53 RR 2d 139 (D.C. Cir. 1983).

CONCLUSION

Conversion to Nielsen DMA designations should be made effective immediately. The Commission should resist the temptation, advocated by those looking to create a regulatory advantage, to game the system and create a regulatory anachronism with no discernable public interest benefit. Nor should the Commission make a bad decision based on factually unfounded fears about its workload. Congress desired broadcasters to have the option to be carried by cable systems in their local markets and it has expressed a preference that privately generated, current market data be used to define such markets. The Nielsen DMA is the logical choice.

Respectfully submitted,

February 26, 1996

THE HEARST CORPORATION

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CERTIFICATE OF SERVICE

I, Reine Blackwell, a legal assistant with the firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certify that a true copy of the foregoing "Reply Comments of the Hearst Corporation" were served on all parties by deposing said copies in the United States Mail, postage prepaid, addressed as follows:

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This the 26th day of February, 1996.

Reine Blackwell

*Hand Delivered